DEPARTMENT OF JUSTICE

VIGOROUS ANTITRUST ENFORCEMENT COVERING THE WATERFRONT: AN UPDATE FROM THE ANTITRUST DIVISION

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San Francisco, CA

11th Annual Golden State Antitrust and Unfair Competition Law Institute

October 23, 2003

Thank you very much. I appreciate the opportunity to be here to speak to you today and to greet so many West Coast friends and colleagues. We remain quite busy in a whole host of areas at the Antitrust Division and, while I put "Covering the Waterfront" in my speech title, I could have as easily used the words "In Case You Have Not Noticed" because a number of things that I want to note for you today have not attracted headlines but are nonetheless significant to our enforcement program.

Strengthening Cartel Enforcement

Criminal antitrust enforcement remains the core mission of the Antitrust Division. Businesses that engage in price fixing, bid rigging, and market allocation are, of course, committing a criminal fraud against their customers and inflicting tremendous harm. Cartels are a direct assault on the principles of competition, and those who participate in them deserve severe penalties. In FY2003, which ended on September 30, we filed 41 criminal cases and obtained $107,336,232 in criminal fines. Significantly, individual cartel members are paying an increasingly greater personal price for their illegal activities. The average jail sentence for an antitrust offense reached a new high of 21 months in FY2003, something I hope you will feature prominently in your corporate compliance programs.

We have begun our work in FY2004 by announcing the first charges to arise from an ongoing federal investigation of bid rigging, fraud, bribery, and tax-related offenses by companies participating in the military moving and storage industry. A Belgian moving and storage company and its managing director were charged with participating in a conspiracy to rig bids and to defraud the U.S. government in connection with a scheme to raise rates charged to the Department of Defense to move household goods belonging to military and civilian

personnel from Germany to the United States. Officials arrested Marc Smet, a Belgian national and managing director of Gosselin World Wide Moving N.V., in Hawaii last week. The Division is conducting its investigation with the assistance of the Defense Criminal Investigative Service and the Army Criminal Investigative Command.

It is important for you, as counsel, to know that in the last few years we have increasingly encountered acts of obstruction in our cartel investigations. In the last three years, we have brought eight cases charging obstruction of justice in connection with cartel investigations.

In other cases, we have obtained sentencing enhancements based on acts of obstruction. Most recently, a few weeks ago, we brought charges against four executives of The Morgan Crucible Company plc, a U.K. company, for their acts to obstruct our carbon products investigation. Morgan executives created a written "script" of lies about their meetings with competitors in an attempt to hoodwink us into believing that their price-fixing meetings were legitimate business meetings. They passed on the script to a competitor with instructions that employees at that company also follow the script when questioned by the Division. In addition to tampering with witnesses, Morgan executives went so far as to create a task force to destroy documents relating to their price-fixing activities and instructed an employee of one of its U.S. subsidiaries to destroy incriminating documents. Morgan itself pleaded guilty to obstruction charges and was sentenced to pay the statutory maximum of $500,000 on each obstruction count for a total fine of $1 million. Two of the Morgan executives, one a Dutch national, have agreed to plead guilty to obstruction charges, while two other Morgan executives, Ian Norris, the former CEO of Morgan and a U.K. national, and Robin Emerson, also a U.K. national, were indicted for their obstruction. We are determined to prosecute conduct that interferes with our cartel

investigations, regardless of the citizenship of the perpetrators or the situs of the acts of obstruction.

Of course, we also are intent on prosecuting these individuals for violating the antitrust laws. Just last week, a Philadelphia federal grand jury returned a superseding indictment against Ian Norris, adding the charge of price-fixing of electrical and mechanical carbon products to the previous charges of obstructing the grand jury investigation of the price-fixing conspiracy.

The Division is also exploring various legislative steps that could be taken to strengthen its enforcement capabilities against criminal cartels. First, the Division supports considering whether maximum jail sentences under the Sherman Act should coincide more closely with sentences for other serious white collar crimes. Second, the Division supports reviewing the Sherman Act ceiling for corporate criminal fines to ensure that Sherman Act fines are commensurate with the damage caused by these far-reaching and harmful offenses and constitute an effective deterrent. And, third, the Division is considering possible ways to strengthen its current leniency program. As you know, cartel behavior can be difficult to detect because participants often go to elaborate lengths to conceal their activities. By giving immunity from prosecution to the first participant in a cartel who reports it and cooperates with our prosecutors, our leniency program has been our most active generator of criminal investigations in recent years, resulting in the uncovering and successful prosecution of a number of major cartels.

One possible way to strengthen the leniency program, advocated by the Division's career prosecutors, might be to give cartel participants an added inducement to report the cartel to us by limiting the private damage recovery from a leniency applicant to the actual damages it caused if it also cooperates with victimized consumers in their suits to recover damages from the other

cartel members. The other cartel members would continue to be jointly and severally liable for the entire amount of treble damages suffered by the victims. We believe this proposal could result in more cartels being uncovered, thereby allowing more victims to recover.

When considering the need for toughening our approach to cartels, you should remember that the target is hard-core cartel activity that each and every executive knows is illegal and that, in economies based on free and open competition, cannot be justified or tolerated.

Mergers: Sharpening Coordinated Effects Analysis

In the merger area, we have devoted a significant amount of resources to reinvigorating coordinated effects analysis in merger review. Last year, we commissioned a team of lawyers and economists to engage in an intensive review of the literature, case law, and agency experience regarding coordinated effects. Their comprehensive and thorough analysis took the form of a substantial coordinated effects manual that we have rolled out internally for the benefit of our attorneys and economists.

Over the past six months the Division has successfully challenged several mergers on coordinated effects grounds. First, the Division filed suit to block SGL Carbon AG, a German firm, and its U.S. subsidiary, SGL Carbon L.L.C., from acquiring certain assets of Carbide/Graphite Group in a bankruptcy court action. The Division concluded that the merger would facilitate coordination among the three remaining producers of large graphite electrodes sold in the United States. Relevant to the Division's analysis was the history of collusion among graphite electrode producers — in fact, SGL Carbon AG was one of the manufacturers that participated in a conspiracy to fix prices and allocate markets for graphite electrodes worldwide in the 1990s and pleaded guilty in both the United States and Canada. Also significant was the

fact that the market structure — which obviously had sustained collusion over a number of years — had not significantly changed. After the bankruptcy court determined that SGL's bid was not the highest and best offer and awarded the assets to a third party, the Division withdrew its complaint.

This past summer, the Division successfully obtained a preliminary injunction to block the acquisition of Bemis Corporation's MACtac subsidiary by UPM-Kymmene's Raflatac subsidiary, a victory that led to abandonment of the deal. Raflatac and MACtac, the second and third largest producers of pressure-sensitive labelstock in North America, would have had a combined market share of less than 25 percent. Along with leading producer Avery, however, the firms collectively account for over 70 percent of total sales in North America. The Division concluded that the proposed merger would have facilitated coordination between the merged company and Avery in the markets for bulk paper labelstock and that, post-acquisition, the remaining labelstock producers would have neither the capability nor the incentive to prevent anticompetitive coordination. The court agreed, finding it probable that price competition would diminish if the merger went forward and issued a preliminary injunction barring the parties from consummating the transaction. While company documents were just one type of evidence presented at trial, you might want to note, for your work in advising clients, the types of documents that were produced from company files. As alleged in our complaint, MACtac's CEO, whom UPM had chosen to manage UPM's North American labelstock business after the transaction, advised a securities analyst shortly after announcement of the transaction that the transaction should bring pricing "discipline" to UPM. In addition, senior UPM officials advised at least two labelstock customers about UPM plans to increase prices after the transaction.

Most recently, the Division filed with the District Court in D.C., a complaint and proposed final judgment that, if entered, will resolve the Division's competitive concerns with Alcan's proposed takeover of Pechiney. Alcan, based in Canada, and Pechiney, based in France, are, respectively, the second and fourth largest producers in North America of brazing sheet, an aluminum alloy used in making heat exchangers for motor vehicles. The combined firm would command over 40 percent of brazing sheet sales in North America, and, along with one other competitor, would account for over 80 percent of such sales. We challenged this transaction on coordinated and unilateral effects grounds. We were concerned that the acquisition would remove Alcan, a low-cost, aggressive, and disruptive competitor, from the market. After the transaction, it would be more likely that the few remaining brazing sheet producers would engage in anticompetitive coordination, because the combined firm and its largest rival would share market leadership and a common incentive to pursue strategies that emphasize accommodation and do not risk provocation. The proposed settlement alleviates our concerns by requiring Alcan to divest Pechiney's only U.S. brazing sheet business, which is located in Ravenswood, West Virginia, if the tender offer is successful.

Finally, I note that a case we filed this year against Dairy Farmers of America and Southern Belle Dairy is scheduled for trial next fall in federal court in Kentucky. We, along with the Commonwealth of Kentucky, are challenging on coordinated effects grounds DFA's non-reportable, completed acquisition of a partial ownership in Southern Belle. Before the 2002 acquisition, DFA, through its subsidiaries, operated the Flav-O-Rich Dairy in London, Kentucky, which competed head-to-head against Southern Belle, located 30 miles away. In 1992, under prior owners, those two dairies pleaded guilty to criminal antitrust bid rigging charges involving

milk sold to schools in Kentucky, admitted to a 10-year bid allocation conspiracy, and paid criminal fines for their involvement. As in the SGL matter, the market structure that was conducive to collusion has not significantly changed.

By highlighting these coordinated effects cases, I do not mean to suggest that we have in any way abandoned unilateral effects theories in merger review. The *GE/Instrumentarium* and *Univision/HBC* transactions in which we filed complaints along with consent decrees are recent examples of merger challenges based on unilateral effects.

Non-Merger Enforcement

The Division has also been active on the non-merger front. In September, the U.S. Court of Appeals for the Second Circuit affirmed an important non-merger trial victory for the Division in the *VISA/Mastercard* case. You will recall that in 1998, the Division sued Visa and MasterCard, based on, among other conduct, the associations' exclusionary rules, which prohibited their member banks from issuing credit and charge cards on rival networks, particularly the American Express and Discover networks. After a 34-day bench trial, the district court found: (1) that the defendants had market power in the network services market and that their exclusionary rules were adopted (a) to ensure that no member bank would gain a "competitive advantage" over other members by issuing American Express or Discover cards, and (b) to weaken American Express and Discover as networks; and (2) that defendants' exclusionary rules caused substantial consumer harm. Moreover, the court concluded that defendants' proffered "procompetitive" justifications – based largely on Visa's and MasterCard's organization as joint ventures – were unfounded.

The defendants appealed and on September 17, 2003, the Second Circuit issued its opinion, agreeing (1) that credit and charge cards are a distinct market from cash, checks, and debit cards, and that the network services market is different from the issuing market; and (2) that Visa and MasterCard, "jointly and separately, have power within the market for network services." The court concluded that the exclusionary rules "harm competition by 'reducing overall card output and available card features,' as well as by decreasing network services output and stunting price competition." The court particularly noted that the exclusionary rules resulted in American Express's and Discover's "total exclusion . . . from a segment of the market for network services," resulting in "serious[] damage" to competition. The court added that Visa and MasterCard "effectively deny consumers access to products that could be offered only by a network in partnership with individual banks."

Notably, the court of appeals found "unpersuasive" defendants' argument that their exclusionary rules were nothing more than "presumptively legal" vertical restraints on distribution. Unlike an agreement between, for example, Coca-Cola and its truckers, the exclusionary rules were more like agreements between Coke, Pepsi, and the other leading soft drink producers to form a consortium that would restrict the consortium's truckers from carrying rivals' soft drinks. Said the Second Circuit, "Far from being 'presumptively legal,' such arrangements are exemplars of the type of anticompetitive behavior prohibited by the Sherman Act." The *VISA/Mastercard* case is an important win for consumers, and the Second Circuit's analysis and conclusions provide important guidance.

Speaking of guidance, the Division is also working on bringing greater clarity to the standards governing single-firm conduct. On October 14, the Justice Department participated as

amicus curiae in oral argument before the United States Supreme Court in *Verizon v. Trinko.* The Division, along with the Federal Trade Commission, filed an amicus brief in that case, arguing that in evaluating single-firm conduct — particularly in the context of claims for the imposition of a duty to assist competitors — an appropriate standard to use is whether the conduct asserted as an antitrust violation would make economic sense but for the elimination or lessening of competition. This test has support in existing case law and is consistent with well-established principles of antitrust jurisprudence. We believe that this test sets forth an objective, transparent, and economically-based framework for assessing single-firm conduct, and it is a standard that the Department has used before as a plaintiff in both the Microsoft and American Airlines cases. We will await the Court's decision.

While we appreciate that it did provide some clarity regarding Section 2 standards, we were admittedly disappointed with the Tenth Circuit's recent decision in the American Airlines predation case upholding the district court's grant of summary judgment to the defendant. We do not take issue with the court's opinion on several important points of legal policy, however. To the contrary, we agree with the following: predation claims should be approached with caution, but not incredulity; *Brooke Group*'s standards were appropriate for evaluating the predation claim in this case; and, because predation claims could chill aggressive competition, the evidentiary standard in such cases should be high. We part ways with the court, however, on the question of whether the Division's evidence satisfied this difficult evidentiary burden. We were also pleased that the court accepted our argument that the market-wide average variable cost test insisted upon by the district court can 'obscure a predatory scheme' and so is not always the appropriate measure of cost. The court accepted, at least in principle, our argument that in

this case an appropriate test was whether American's cost of adding capacity on a route exceeded the revenues that the additional capacity generated. We were also pleased that the court did not adopt a "meeting competition" defense to Sherman Act claims.

Although we can point to some positive aspects of the *American Airlines* decision, we hope to achieve a different result in *United States v. Dentsply International,* a case in which we have filed a notice of appeal. In 1999, the Division sued Dentsply International, the dominant U.S. manufacturer of prefabricated artificial teeth used to make dentures, for violating Sherman Act §§ 1 & 2 and Clayton Act § 3 by excluding its competitors from the distribution channels necessary to compete effectively and thus illegally maintaining its monopoly power. The case was tried before Judge Sue L. Robinson, Chief Judge of the District of Delaware, in April and May of 2002. On August 8, Judge Robinson issued her opinion, concluding that Dentsply had not violated the law, primarily because its rivals could still sell their products through other distribution channels, such as direct sales to dental laboratories.

In another high-profile, single firm conduct case, *LePage's v. 3M*, the Supreme Court, which is considering 3M's petition for certiorari, has asked the United States to file a brief expressing its views. As many of you know, LePage's, a manufacturer of "second brand" and private label tapes, claimed that 3M unlawfully maintained its monopoly in the transparent tape market, in which 3M's Scotch tape brand holds a 90 percent market share. 3M had instituted rebate programs for purchases of multiple 3M products, which LePage's alleged as a practical matter required 3M's wholesale customers to stop or sharply curtail their tape purchases from LePage's to avoid losing significant 3M rebates on the diverse products. LePage's allegedly

could not offer comparable rebates because it sold, and could therefore offer rebates on, only tape.

An *en banc* Third Circuit reinstated a jury verdict for LePage's, rejecting 3M's argument that under the Supreme Court's *Brooke Group* decision, "a plaintiff cannot succeed in a § 2 monopolization case unless it shows that the conceded monopolist sold its product below cost." Instead, the *en banc* court held that "a monopolist will be found to violate § 2 of the Sherman Act if it engages in exclusionary or predatory conduct without a valid business justification." The court did not, however, articulate a clear and administrable principle for distinguishing lawful from unlawful rebates. We are currently formulating our views.

In our case against Microsoft, we will be in the D.C. Circuit in ten days, arguing in defense of our settlement, which two trade organizations are attempting to challenge. The case has obviously been of enormous public interest and, in addition to issues going to the merits of the settlement, this appeal raises important issues regarding intervention for purposes of appeal and Tunney Act procedures. In the meantime, we have a dedicated, experienced team of lawyers and economists working together with 17 state Attorneys General and a Technical Committee of industry experts, working to ensure full compliance with the final judgment. All members of this dedicated team are interested in hearing industry feedback on any issues relating to Microsoft's compliance. Judge Kollar-Kotelly is actively engaged in overseeing that compliance and has held regular status conferences with the parties, including one tomorrow morning, in fact.

We recently weighed in, this time without an invitation, on the interpretation of an antitrust statute that does not get as much attention as Section 2 of the Sherman Act. In a private case involving movie theaters in New York City, *Reading International, et al. v. Oaktree Capital*

Management, et al. (S.D.N.Y.), the plaintiff alleged, among other claims, that Oaktree, an investment fund, and two of its officers violated Section 8 of the Clayton Act by having one of its officers serve as a director on the Board of a movie theater chain, while a second officer served as a director on the Board of a competing theater chain. Section 8 prohibits, as you know (if you remember!) interlocking directorates between competing firms. Defendants moved to dismiss the complaint and, in doing so, discussed the positions of the antitrust authorities. The United States submitted a brief *amicus curiae*, which the district court accepted, to re-emphasize the United States' longstanding position that a business whose deputized representatives serve simultaneously as directors or officers of two competing corporations may violate Section 8.

These cases have been important priorities for the Division, but more generally, Hew Pate has also announced our determination to improve the efficiency of our non-merger investigations. The Merger Review Process Initiative that we put in place in 2001 has been successful in making our merger investigations more transparent, orderly, efficient and, ultimately, more effective in identifying the issues that are most relevant to the Division's merger review. But merger review is not the only area that could benefit from continued procedural reforms. We want to improve the pace of civil non-merger investigations, which are not subject to the same stringent timing requirements as merger investigations. Over the coming months, we intend to explore ways in which we might be able to make the civil non-merger investigative process more effective and efficient. We are working on internal guidelines and time tables to ensure that non-merger investigations stay on track and move effectively toward resolution. In addition, we are reviewing our options for responding to the problems we have had with CID compliance. Those who have come to view receipt of a CID as an invitation for

drawn-out negotiations and eventual production whenever you get around to it might want to rethink that view.

Hew has also indicated his desire to explore how, in appropriate cases, the Division can increase transparency in our decision-making process. When a thorough investigation fails to produce evidence of antitrust violations, responsible antitrust enforcement requires closing the investigation. It may be that, in some instances, we can assist the bar, firms, and the general public by explaining, within the boundaries of our confidentiality obligations, the rationale for the decision. We have already taken an important step in this direction. At the end of July, in light of the high level of public interest in the matter, we issued a five-page statement explaining why, after an extensive investigation of the available facts, the Division concluded that the Orbitz joint venture has not reduced competition or harmed airline consumers. By necessity, our discussion was limited by the Division's obligation to protect the confidentiality of certain information that informed the decision. We also warned readers that, because our cases are all highly fact-specific, and many underlying facts were not public, they should not draw conclusions regarding how the Division is likely to analyze particular collaborations or activities, or transactions involving particular firms, in the future. Even with those qualifications, however, we believe that the statement added to the public's understanding of the result in this case and antitrust analysis generally.

As most of you know, Orbitz is a travel website owned by five major domestic airlines. The Division opened its investigation in March 2000, and the Orbitz service became operational in June 2001. All of the airline owners, and approximately 40 domestic and foreign airlines that are "charter associates," are bound by a "most favored nation" (MFN) clause that was the focus

of our investigation. The MFN requires the owners and charter associates to provide Orbitz with any publicly available fares that the carriers list on their own websites or on other online travel sites. The Division analyzed whether the MFN clause was likely to facilitate coordination among the participating airlines or reduce their incentives to discount, resulting in higher fares, or make Orbitz dominant in online air travel distribution. The Division found that the MFN did not result in higher fares or create such dominance. Since the initiation of the Orbitz service, average airfares have decreased. Additionally, Orbitz has remained the third largest online travel agency for over a year, and, according to a December 2002 Department of Transportation report, had 24 percent of online ticket sales. There are more details regarding our decision to close the investigation which I do not have time to share here. I encourage you to read the statement if you have not done so (It is available at http://www.usdoj.gov/atr/public/press_releases/2003/201208.htm.).

Continuing Convergence Efforts

Let me conclude by spending a few moments talking about antitrust convergence. Convergence around sound economic antitrust principles and efficient and effective procedures – not convergence for convergence's sake – will remain a top priority at the Antitrust Division. We will continue to devote significant resources to a wide range of international initiatives bilaterally and multilaterally through our participation in ICN, OECD, and UNCTAD, as well as through domestic initiatives.

Consensus-building efforts – in particular, ICN – present the most promising opportunity to achieve principled and lasting convergence. ICN has enjoyed early success, and there are several reasons why we believe it has a promising future. First, it is a member-driven virtual

network of antitrust enforcers organized around diverse working groups that consult regularly and informally. There is no elaborate infrastructure, permanent secretariat, or employees. Agency heads commission and guide the efforts of working groups focused on specific competition law issues. The flexibility and immediacy of ICN's virtual nature is the foundation of its strength.

Second, ICN is "all-antitrust inclusive" – all jurisdictions with antitrust laws are welcome as members and are encouraged to add their perspectives and expertise to the ICN's work. Outside of the membership, we draw upon the insight and skills of non-governmental advisors of all forms: academics, industry groups, private practitioners, and other international organizations.

A third key to the ICN model is its aspirational nature. ICN makes recommended practice proposals and serves as an expertise-sharing network. There are no legal obligations to adopt ICN practices. Rather, we strive for implementation through persuasion and by producing recommendations based upon best practices perspectives from public and private sectors. This approach has proven to be efficient and effective.

I note that the strong efforts that we make on the international front pay dividends on an ongoing basis in ways that you may not even recognize. I will use the recent GE/Instrumentarium merger investigation as an example. No bilateral relationship in international competition is as important as the U.S./E.U. cooperation. You may not realize it, but we are working together with the E.U. every week on matters of common interest. In our respective, *GE-Instrumentarium* merger investigations and subsequent settlements, we used our U.S.-E.U. Best Practices for mergers and communicated and cooperated extensively with our

E.U. colleagues during the course of our investigation and, ultimately, in reaching our respective settlements. We were concerned that the transaction would substantially lessen competition in the sale of monitors used for patients requiring critical care and mobile C-arms used for basic surgical and vascular procedures**.** Critical care patient monitors are medical devices used by hospitals and other healthcare facilities to measure and display the vital physiologic signs of patients in serious medical condition. Mobile C-arms developed for basic surgical and vascular procedures are full-size, fluoroscopic x-ray machines that provide continuous, real-time viewing of patients during those procedures. General Electric and Instrumentarium are two of only a few competitors that provide these important medical devices to healthcare providers, and they have competed head-to-head on price, product features, and service.

The E.U.'s settlement, which in this case occurred first, requires divestiture of Instrumentarium's Spacelabs patient monitor subsidiary and imposes additional conditions. The settlement we reached with GE requires the company to divest two Instrumentarium businesses – Spacelabs and the Ziehm C-arm business. The Division will continue to work closely with the E.U. in the implementation of the Spacelabs divestiture. Moreover, the proposed final judgment we filed with the court contains provisions to ensure that the Spacelabs assets are sold to a buyer that will maintain competition in both jurisdictions. If the defendants do not divest Spacelabs within the time provided in the decree, the United States can apply to the court for appointment of a trustee. (That trustee would be responsible for the Spacelabs divestiture only. Under the consent decree's terms, if necessary, the United States can apply for a separate trustee for the Ziehm assets, which are not part of the parties' settlement with the E.U.) According to the decree, "the Court shall appoint a trustee selected by the United States in good-faith consultation

with the European Commission to ensure selection of a trustee acceptable to both the United States and the European Commission and approved by the Court to effect the divestiture of Spacelabs." The defendants also have the ability to object to a sale by the trustee if the European Commission has not approved the proposed acquirer.

We continue to work on significant policy collaborations with the Federal Trade Commission. As you know, last year the two agencies held Intellectual Property Hearings, the goal of which was to position us ahead of the curve on the complex issues that arise when competitive concerns and intellectual property rights overlap. The hearings provided us with the opportunity to educate ourselves and to further refine our enforcement policy in some important areas. We are looking forward to publishing a report on the Intellectual Property Hearings by the end of the year.

We are also entering a new phase of our Health Care and Competition Policy project. Earlier this month, we concluded more than 25 days of public hearings that had begun in February and covered competition issues related to health plans, hospitals, and providers. (The record does not close until late November, so there is still time to submit comments.) Through the hearings and preparation of a joint report, the Agencies intend to enhance their understanding in this area and promote learning among the various participants in the healthcare field. We expect to issue the report in 2004.

Finally, our Economics Deputy, David Sibley, is overseeing the work of several Division economists who are trying to develop a better understanding and shed some light on certain pricing issues. We will soon be announcing a combined law and economics conference in which

we plan to gather interested economists, academics, and members of the bar to discuss various pricing and vertical issues.